Supreme Court, U.S.
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No. 87-1866

In The
Supreme Court of the United States
October Term, 1988

A. REGINALD EAVES, et al.,
Appellants,

v.

JOE FRANK HARRIS, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1.

Does the statute in question violate citizens' voting rights by providing a procedure for temporarily suspending with pay local elected officials who are indicted for felonies related to the activities of their office?

2.

Does procedural due process require an adversarial administrative inquiry into guilt or innocence before an indicted public official can be suspended pending the outcome of their criminal trial?

3.

Does a statute violate equal protection by differentiating between local elected officials who have been indicted for corrupting their office, and local elected officials who have not been indicted?

4.

Does this case present a substantial federal question?

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STATUTE CITED:

Official Code of Georgia Annotated § 45-5-6 (Michie 1982, Supp. 1988) ..... *Passim*

THE STATUTE INVOLVED

At issue in this case is the constitutionality of a Georgia statute providing for the suspension with pay of elected officials indicted for felonies relating to the activities of their office. This statute is found at *Official Code of Georgia Annotated* § 45-5-6 (The Michie Company 1982, Supp. 1988) [hereafter cited as "O.C.G.A. § 45-5-6"].

The full text of the statute is set forth on Pages 2A-3 of Appellants' Jurisdictional Statement. Briefly, O.C.G.A. § 45-5-6 provides a mechanism whereby a local public official can be suspended with pay "upon indictment for a felony . . . which felony indictment relates to the performance or activities of the office. . . ." O.C.G.A. § 45-5-6(b). In such a case, a Review Commission is appointed to determine: (1) whether the indictment relates to and adversely affects the administration of the office; and (2) whether the rights and interests of the public are adversely affected thereby. O.C.G.A. § 45-5-6(c). If so, the Review Commission recommends to the Governor that the official be suspended. The Governor reviews the recommendation of the Review Commission, and "if and only if the commission recommends suspension," then the Governor "may" suspend the indicted official. O.C.G.A. § 45-5-6(c). The suspension is with pay. O.C.G.A. § 45-5-6(c). Unless the indicted official obtains a continuance of the trial, the suspension lasts only until the indicted official is tried, or until the expiration of the next regular or special term of the applicable court. O.C.G.A. § 45-5-6(i).

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STATEMENT OF THE CASE

This case began on November 12, 1987, when Appellants filed an action in the Superior Court of Fulton County. Their Complaint alleged that O.C.G.A. § 45-5-6 is unconstitutional; and they sought preliminary and permanent injunctive relief against any action being taken to suspend Appellant Eaves.

On November 13, 1987, the trial court denied Appellants' prayers for preliminary injunction. On November 16, 1987, Appellees moved for summary judgment. In order to expedite the case, and in an attempt to have the matter reach the Georgia Supreme Court at the earliest possible date, the parties stipulated that the trial court could rule *instanter* upon the motion for summary judgment. Thus, also on November 16, 1987, the trial court entered an order granting Appellees' motion for summary judgment, holding that O.C.G.A. § 45-5-6 is constitutional.

The Georgia Supreme Court granted an expedited appeal. On February 16, 1988, the Georgia Supreme Court affirmed the judgment of the trial court, finding O.C.G.A. § 45-5-6 constitutional.

On February 22, 1988, Appellants filed their notice of appeal to the Supreme Court of the United States. Their Jurisdictional Statement was mailed to Appellees on May 13, 1988.

Appellees hereby move: (a) That the appeal be dismissed because no substantial federal question is presented; or, in the alternative, (b) That the decision of the Georgia Supreme Court be affirmed.

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STATEMENT OF THE FACTS

In 1986, Appellant Eaves was elected as a county commissioner for Fulton County. At the time of his election, O.C.G.A. § 45-5-6 was in full force and effect. This statute provides a procedure for suspending public officials who are indicted for felonies relating to the activities of their office. Thus, Appellant Eaves' tenure in office was subject to the conditions set forth in O.C.G.A. § 45-5-6 at the time he was elected.

On October 16, 1987, a federal Grand Jury returned a True Bill of Indictment of Plaintiff Eaves on four counts of felony violations of the Hobbs Act, 18 U.S.C. § 1951. Appellant Eaves was accused of accepting bribes in exchange for his favorable vote on zoning matters before the county commission. This indictment resulted from an F.B.I. "sting" operation.

On October 19, 1987, acting pursuant to O.C.G.A. § 45-5-6, Appellee Bowers, the Attorney General of Georgia, forwarded a copy of the indictment to Appellee Harris, the Governor of Georgia. The Governor, by Executive Order, extended through November 12, 1987, the time for Appellant Eaves to voluntarily authorize his suspension by the Governor.

On November 12, 1987, declining to voluntarily suspend himself, and seeking to forestall his suspension under O.C.G.A. § 45-5-6, Appellant Eaves, with the other Appellants, filed an action seeking an injunction preventing his suspension. Appellants' prayers for preliminary injunctive relief were denied by the trial court on November 13, 1987.

After issuance of the trial court's order on November 13, 1987, acting pursuant to O.C.G.A. § 45-5-6, Appellee Harris appointed a Review Commission to inquire into the matter of the indictment of Appellant Eaves. Pursuant to the statute, Appellee Bowers was a member of the Review Commission.

The Review Commission scheduled a hearing for November 20, 1987. Appellant Eaves was given notice of the hearing, and of the nature of the inquiry. Appellant Eaves attended the hearing, and was represented by counsel, who argued on his behalf. At the conclusion of the hearing, the Review Commission voted to recommend to Governor Harris that Appellant Eaves be suspended from office.

Later on November 20, 1987, Governor Harris, acting upon the recommendation of the Review Commission, issued an Executive Order suspending Appellant Eaves, with pay, pending the outcome of his criminal trial upon the charges for which he was indicted. Shortly thereafter a temporary replacement county commissioner was appointed to act during Appellant Eaves' suspension.

From November 20, 1987 until May 2, 1988, Appellant Eaves was suspended with pay. On May 2, 1988, a federal jury convicted Appellant Eaves on three of the four counts for which he was indicted, acquitting him of the other.

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ARGUMENT

I.

THE STATUTE IN QUESTION DOES NOT LIMIT OR ABRIDGE VOTING RIGHTS IN ANY WAY.

By its terms, O.C.G.A. § 45-5-6 places no limit, condition or qualification upon anyone's voting rights. By their own accounts, Appellants Stanley and Bridges voted for Appellant Eaves in the 1986 election. Appellants Stanley and Bridges have had and continue to have the same rights as any other registered voters to go to the polls in any election and vote for whomsoever they please.

Appellants Stanley and Bridges do not argue that there has been any interference whatsoever with their actual right to vote. The true substance of their complaint is that they have not been continuously represented by the candidate for whom they voted. The Constitution does not, and cannot make any such guarantee.

Democratic processes, by their nature, anticipate that some candidates will win, while others lose. Thus, there is no "right" to be represented by the particular candidate for whom one voted. Also, since elected officials can leave or be removed from office for a variety of reasons, there is no unqualified "right" for the candidate of one's choice to remain in office for their full term. Finally, many laws provide for the filling of vacancies in office by appointment; and Appellees know of no authority for the proposition that such a procedure is inherently violative of the Constitution.

O.C.G.A. § 45-5-6 was in effect at the time of the 1986 election. Thus, when Appellants Stanley and Bridges voted

for Appellant Eaves, they did so subject to the condition that, if elected, he could be suspended if indicted for felonies relating to his office. The real question, then, is whether the Constitution prohibits the State of Georgia from imposing such a condition on its local elected offices. This, in essence, is a question of substantive due process.

The statute is clearly intended to protect the public's confidence in the integrity of its government. This is a goal which this Court has recognized as being of great importance, *See, First National Bank of Boston v. Bellotti,* 435 U.S. 765, 789 (1977); *Buckley v. Valeo,* 424 U.S. 1, 27 (1975); *CSC v. Letter Carriers,* 413 U.S. 548 (1972). Appellees submit that it will inevitably undermine the public's confidence in its government if an official who is indicted for corruption in office can continue exercising the powers of that office after being indicted. Thus, Appellees submit that this statute is rationally related to a compelling state interest, consistent with the requirements of substantive due process.

Appellees have never argued, and the Georgia Supreme Court did not hold, that the right to vote is not a fundamental right protected by the Constitution. The Georgia Supreme Court simply held that O.C.G.A. § 45-5-6 does not violate Appellants' right to vote. Appellees submit that this holding of the Georgia Supreme Court was eminently correct, and should be upheld by this Court.

II.

THE STATUTE IN QUESTION SATISFIES THE REQUIREMENTS OF PROCEDURAL DUE PROCESS.

Before the Review Commission recommended the suspension of Appellant Eaves, a hearing was held. Appellant

Eaves attended the hearing, was represented by counsel, and his counsel made a substantial argument against his suspension. The hearing was attended by a number of supporters of Appellant Eaves; and the transcribed discussions by the members of the Review Commission indicate that the arguments on behalf of Appellant Eaves were understood and considered.

Appellants argue that these procedures were inadequate because he was not afforded a full adversarial hearing into his guilt or innocence of the crimes for which he was indicted.

Appellees question the logic of such an argument in the context of this particular statute. The Review Commission is not charged with determining, or even inquiring into, guilt or innocence. Under O.C.G.A. § 45-5-6(c), the Review Commission is to determine two things: (1) Does the indictment relate to and adversely affect the administration of the office of the indicted official; and (2) Are the rights and interests of the public adversely affected thereby?

The indictment of a public official for corruption bears great potential for placing the office under a cloud pending the outcome of the criminal trial. Such a situation can cause harm to the rights and interests of the public, even though the indicted official may eventually be found innocent. It is this potential for harm to which O.C.G.A. § 45-5-6 is addressed; and it is this potential for harm which should be the proper focus of the Review Commission's inquiry. Since the Review Commission makes no inquiry into guilt or innocence, the presentation of evidence as to guilt or innocence would be of questionable benefit. Appellants' assertion that this procedure somehow creates

an irrebutable presumption of guilt is without foundation. As this Court has recently recognized, an indictment can provide a reasonable basis for suspension for at least two reasons: (1) The finding of "probable cause" [not "guilt"] by an independent body demonstrates that the suspension is not arbitrary; and (2) The return of the indictment is itself an objective fact that will in most cases raise serious public concern. *Federal Deposit Insurance Corporation v. Mallen*, — U.S. —, 56 U.S.L.W. 4464, 4468 (Decided May 31, 1988). The suspension is based upon the indictment of the official, not upon his guilt of the crimes for which he is indicted. Appellees submit that this is an appropriate policy, which does not violate any constitutional imperative.

It is an underlying assumption of Appellants' argument that an administrative inquiry into guilt or innocence would somehow be beneficial to the accused official. This argument cannot withstand logical analysis. Federal courts which have considered the question have noted the potential harm such a hearing could do to an accused person's defense in a subsequent criminal trial. *See; Polcover v. Secretary of the Treasury*, 477 F.2d 1223, 1232 (D.C. Cir. 1973), *cert. den.* 414 U.S. 1001. Likewise, the interests of the public would not be well served. Administrative proceedings that preceded a criminal trial would "constitute improper intereference with the criminal proceedings if they churn over the same evidentiary material." *Peden v. United States*, 512 F.2d 1099, 1103 (Ct. Cl. 1975).

> "Thus, the interests of both the employees and the public are better protected by allowing suspension based on the fact of the indictment alone, rather than requiring administrative inquiry into the unlawful conduct alleged in the indictment." *Brown v. Dept. of Justice*, 715 F.2d 662, 668 (D.C. Cir. 1983).

Appellant Eaves was afforded notice, and a hearing at which he was given an opportunity to make his argument as to why he should not be suspended. Appellees submit that this hearing fully complied with the Constitutional requirement of procedural due process.

In determining what sort of process is due in a given case, there must be a balancing of the competing interests involved, including: (1) the importance of the private interest and the length or finality of the deprivation; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the magnitude of the governmental interests involved. *See, Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1981); *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1975).

As to the importance of the private interest, as noted above, the precise interest at stake is Appellant Eaves' asserted right to continue exercising the powers of his office after being indicted for felonies related to his performance of that office. If this is a constitutionally protected "right," the degree of its importance is open to some debate. Coupled with the limited nature of the interest at stake, O.C.G.A. § 45-5-6 provides for a strictly limited deprivation. The indicted official is suspended *with pay* pending the outcome of his criminal trial. In another context, this Court has recognized that suspension with pay does not raise the same Constitutional concerns as suspension without pay. *See, Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 544-545 (1984). Further, the statute places a strict limitation upon the possible duration of a suspension based upon an indictment, a

fact to which the Georgia Supreme Court properly attached great importance.

As to the risks of an erroneous deprivation, it is submitted that they are not unreasonably great. Appellants devote considerable energy to an argument that a grand jury may erroneously indict an innocent person. Again, this argument is somewhat beside the point. The Review Commission does not inquire into guilt or innocence. The Review Commission is concerned with whether the indictment relates to and adversely affects the office, and whether the interests of the public are harmed thereby. It is submitted that the procedures followed are sufficient to make such a determination with reasonable accuracy. This Court has recently noted that it is unlikely that a suspension based upon an indictment will be erroneously imposed. *Federal Deposit Insurance Corporation v. Mallen, supra.* The additional procedural "safeguard" suggested by Appellants, an adversarial inquiry into guilt or innocence, would, if anything, be of negative value.

Finally, as noted above, the governmental interest involved is of great importance. It is extremely important for a democratic society to preserve the faith of citizens in the integrity of government. *See, First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1977); *Buckley v. Valeo*, 424 U.S. 1, 27 (1975); *CSC v. Letter Carriers*, 413 U.S. 548 (1972).

The Georgia Supreme Court held that O.C.G.A. § 45-5-6 affords adequate due process protection to the indicted official pending resolution of the indictment. This holding should be affirmed.

III.

THE STATUTE IN QUESTION COMPORTS WITH THE REQUIREMENTS OF EQUAL PROTECTION.

In broad terms, equal protection requires that persons similarly situated be treated with equality. *Plyer v. Due,* 457 U.S. 202, 216 (1982).

Appellants Stanley and Bridges claim that they have been denied equal protection because, during the term of Appellant Eaves' suspension, they have been represented by an appointed commissioner, whereas residents of other commission districts [whose commissioners have not been indicted] are represented by elected commissioners.

Appellant Eaves claims that he has been denied equal protection because he has been suspended from office, whereas county commissioners who have not been indicted can continue to exercise the powers of their office.

The argument that Appellants Stanley and Bridges are represented by someone whom they have not chosen, and whose goals for the county might differ from their own, is not a cognizable equal protection argument. Any time a vacancy in a local office is filled by appointment, the voters in that locality will be represented by someone they did not elect. Any voter who did not vote for a successful candidate will be represented by someone whose goals for the locality might differ from those of the unsuccessful voter. The Constitution cannot and does not guarantee against such eventualities.

O.C.G.A. § 45-5-6 comports with the requirements of equal protection because it treats those similarly situated

with equality. The statute applies equally to all public officials who fall within its purview. The only time such officials would receive any different treatment under O.C.G.A. § 45-5-6 would be when they are indicted for felonies related to their performance of their office. There is, it is submitted, an entirely rational reason for differentiating between officials who have been indicted for corrupting their office and officials who have not been indicted.

The Georgia Supreme Court held that O.C.G.A. § 45-5-6 not only treats all elected officials similarly, but also has a rational basis for treating those elected officials laboring under a felony indictment as a separate class. Therefore, the Georgia Supreme Court found that O.C.G.A. §45-5-6 does not violate equal protection. This holding should be affirmed.

IV.

THE APPEAL SHOULD BE DISMISSED BECAUSE NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

As noted above, the "right" which Appellants seek to have exonerated by the Supreme Court of the United States is a purported right of a county commissioner to continue exercising the powers of his office after being indicted for corrupting that very office. This "right," if it is one, is one which is very confined in scope.

The "deprivation" in this case is a temporary suspension with pay. It is impossible to envision a statute which could impose a milder sanction and still achieve the goal of preventing the indicted official from exercising

the powers of his or her office pending the outcome of the criminal trial.

Balanced against the limited private right at stake, the State of Georgia has what this Court has recognized as a strong interest in preserving the faith of citizens in the integrity of their government.

In view of the dubious nature of the private "right" asserted, and the strictly limited nature of the "deprivation" worked by the statute involved, and the compelling State interest at stake, Appellees submit that this case simply does not present the sort of substantial federal question required to invoke the jurisdiction of the Supreme Court of the United States. Therefore, the appeal should be dismissed.

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CONCLUSION

For the reasons set forth above, Appellees respectfully move the Court: (a) That the appeal be dismissed; or, in the alternative, (b) That the decision of the Georgia Supreme Court in this case be summarily affirmed.

Respectfully submitted,

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